



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.E002 OF 2021

IN THE MATTER OF ARTICLES 2,3,10,12,219,20,21,23,27(1),(2),28,38 (3),47,48,

50,165,174,176,177,178, AND 196, OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 11 OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF STANDING ORDERS 30,48,63,68,70,71 AND 74

OF THE NYANDARUA COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF THE ILLEGAL AND UNLAWFUL GAZETTEMENT OF A SPECIAL SITTING FOR THE REMOVAL OF THE SPEAKER NYANDARUA COUNTY ASSEMBLY BY HON. ZACHARY MWANGI NJERU

AND

IN THE MATTER OF THE ILLEGAL AND UNLAWFUL PURPORTED REMOVAL OF THE

HON. JAMES WAHOME NDEGWA FROM THE OFFICE OF THE SPEAKER NYANDARUA

COUNTY ASSEMBLY

HON. JAMES WAHOME NDEGWA.....PETITIONER/APPLICANT

VERSUS

HON ZACHARY MWANGI NJERU.....1ST RESPONDENT

HON.EDINALD WAMBUGU KINGORI.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF NYANDARUA.....3RD RESPONDENT

THE GOVERNMENT PRINTER-GOVERNMENT PRESS.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

CONSOLIDATED WITH EO1 OF 2021

CONSTITUTIONAL PETITION NO. E01 OF 2021

IN THE MATTER OF ARTICLES 1,2,3,10,20,21,23,165,174,

176,196,232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF STANDING ORDER NO. 5 OF THE COUNTY ASSEMBLY OF NYANDARUA

AND

IN THE MATTER OF THE FILLING OF THE VACANCY OF THE OFFICE

OF THE SPEAKER OF THE COUNTY ASSEMBLY OF NYANDARUA

AND

IN THE MATTER OF THE SOVEREIGNTY OF THE PEOPLE OF KENYA

AND

IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON. ZACHARY MWANGI NJERU.....PETITIONER/APPLICANT

VERSUS

HON. JAMES NDEGWA WAHOME.....1ST RESPONDENT

HON. MR. MUKIRI MUCHIRI.....2ND RESPONDENT

AND

THE COUNTY ASSEMBLY OF NYANDARUA.....1ST INTERESTED PARTY.

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND INTERESTED PARTY.

RULING.

1. The Petitioner/ applicant filed a NOTICE OF MOTION dated **11th February 2021** praying for the following orders:

a) Prayers 1- 9 Spent

b) That this Honorable Court be pleased to issue an interim order of stay of execution of the declaration of the 1st and 3rd Respondents that the Notice of motion dated 15thDecember, 2020 for the impeachment of the petitioner/applicant from the office of the Speaker of Nyandarua County Assembly was successful pending the hearing and determination of the Amended Petition.

c) That this Honorable Court be pleased to issue an interim order of stay of execution of the resolutions and/ or decision of the purported unlawful impeachment of the Petitioner/Applicant from the office of the Speaker of Nyandarua County Assembly of 10th February, 2021 by the 3rd Respondent pending the hearing and determination of this Amended Petition.

d) That pending the hearing and determination of this Amended Petition this Honorable Court be pleased to grant interim orders of injunction restraining the 1st and 2nd respondents and/or any other member of the 3rd Respondent from acting and performing the functions of the Office of the Speaker Nyandarua County Assembly to include presiding over any sittings of the Assembly unless the Petitioner is lawfully impeached and/or removed from office.

e) That this Honourable Court be pleased to issue an interim order of injunction restraining the 1st and 2nd respondents, any member of the 3rd respondent, its and/or their agents, servants and/or persons acting at its and/or their behest respectively from degazetting and/ or causing the degazettement of the Petitioner/Applicant as the Speaker of Nyandarua County Assembly and/ or in the alternative if degazetted, an order suspending any such degazettement pending the hearing and

determination of the Amended Petition.

f) That this Honourable Court be pleased to issue an interim order of injunction restraining the 1st and 2nd respondents, any member of the 3rd respondent, its and/or their agents, servants and/or persons acting at its and/or their behest respectively from declaring a vacancy in the office of the Speaker Nyandarua County Assembly by way of gazettelement or otherwise and/or in the alternative if so declared or gazetted, an order suspending any such declaration and/or gazettelement pending the hearing and determination of the Amended Petition.

g) That this Honourable Court be pleased to issue an interim order of injunction restraining the 1st and 2nd respondents, any member of the 3rd respondent, its and/or their agents, servants and/or persons acting at its and/or their behest respectively from purporting to appoint, elect and/ or nominate any person as the Acting and/or Substantive Speaker of Nyandarua County Assembly in lieu of the Petitioner/Applicant herein pending the hearing and determination of the Amended Petition.

h) That this Honourable Court be pleased to issue an interim order of injunction restraining the 1st, 2nd, 3rd, and 5th respondents, any member of the 3rd respondent, its and/or their agents, servants and/or persons acting at its and/or their behest respectively from preventing and/or obstructing the petitioner/applicant from accessing the 3rd respondent's precincts and/or from interfering with the Petitioner/Applicant's execution of the lawful duties of his office as the Speaker of the 3rd Respondent Nyandarua County Assembly pending the hearing and determination of the Amended Petition.

i) That an order does issue directed at the County Police Commander and Critical Infrastructure Police Unit (CIPU), Nyandarua County compelling them to ensure compliance with the orders issued by this Honourable Court.

j) That an order does issue directed at the County Police Commander and Critical Infrastructure Police Unit(CIPU), Nyandarua County compelling them to ensure compliance with the orders issued by this Honourable Court.

k) That the costs of this Application be catered for by the respondents.

2. The application is supported by the annexed affidavit of **JAMES WAHOME NDEGWA** the petitioner's herein and premised on the following grounds thereof stating that on 26th January, 2021 this Honourable Court ordered inter alia that, all procedures provided in the County Governments Act as amended and the standing orders of the County Assembly of Nyandarua must be strictly followed in the impeachment proceedings for the removal of the Petitioner/Applicant.

3. That the Honourable Court further ordered that for the avoidance of doubt, the threshold for the removal of the speaker as per the exact provisions of the County Governments Act was 75% of all the members of the County Assembly.

4. On 9th February, 2021, the House Business Committee of the 3rd respondent which is mandated with preparation of the business of the Assembly resolved to invite the Petitioner/applicant to appear before the 3rd Respondent on 10th February, 2021 to defend himself against the allegations levelled against him in the Notice of motion dated 15th December 2020 with a right to be represented by counsel.

5. Indeed on the 10th February,2021, the Petitioner/Applicant did appear before the 3rd respondent and responded to the said allegations as per his response dated 2nd February,2021 and after the response by the Petitioner/Applicant, the 1st Respondent who was presiding over the impeachment proceedings opened the floor of the 3rd respondent for debate.

6. That in the course of the impeachment motion and/or debate, the Majority Party chief whip of the 3rd respondent rudely interrupted the proceedings by shouting that she had a letter from the Jubilee Party trending in the social media and which letter she had forwarded to the 1st Respondent through his WhatsApp who had failed to bring to the attention of the house the contents therein.

7. The said Majority Party Chief Whip as per the applicant being the link between Jubilee Party and the Speaker of the 3rd Respondent acted in breach of the standing orders of the 3rd Respondent requiring her to communicate in writing to the speaker of the 3rd respondent of any correspondences from the Jubilee Party.

8. That the respondent in blatant disregard of the provisions of the standing orders, practice and precedence of parliamentary business acceded to the request of the Chief whip to have the said letter contained in her cell phone read out to the house despite objections from several members of the 3rd respondent.

9. That the Respondent read a letter purportedly dated 9th February,2021 and purportedly authored by Hon.Raphael Tuju, the Secretary General of the Jubilee Party purporting to suspend from the sittings of the 3rd respondent with immediate effect seven (7) MCAs aligned to the Petitioner despite persistent objections from some members of the 3rd respondent.

10. Based on the strength of the said purported letter, the 1st respondent requested that seven (7) members who had been purportedly suspended from the sittings of the 3rd Respondent to withdraw from the chambers voluntarily. The said members who had declined to sign for the applicant's impeachment motion dated 15 December,2020, having not received any such purported letter declined to withdraw from the chambers and insisted that their rights to vote for and or against the said motion be exercised.

11. A roll call vote was taken pursuant to the standing orders of the 3rd Respondent where all the 37 members of the 3rd respondent present

voted for and against the said Notice of motion which results were Twenty-Six (26) members of the 3rd respondent voted in support of the impeachment motion inclusive of the 1st Respondent, eleven (11) voted against the said Impeachment motion and 2 were absent.

12. The 1st Respondent in blatant disregard of the standing orders of the 3rd respondent failed and/or refused to announce the result of the votes as presented to him by the two tellers as contained in paragraph 13 above. He instead proceeded to pronounce results of the votes as follows; that is, twenty Six (26) members of the 3rd respondent voted in support of the impeachment motion inclusive of the 1st Respondent, four (4) voted against the said Impeachment motion and there was no absenteeism.

13. That the 1st respondent further declared that the votes by the seven (7) members appearing in the letter dated 9th February, 2021 by Jubilee Party were invalid and excluded them from the total tallying of the total votes cast thus pronouncing that only four (4) members had voted against the motion for the impeachment of the speaker.

14. That the 1st respondent in blatant breach of the law further declared that the applicable threshold for the impeachment of the petitioner was 75% of the total eligible votes cast and thus the Twenty-six (26) votes cast in favour of the motion had met the threshold hence the motion had succeeded and that the Petitioner/applicant stood impeached forthwith.

15. He went on to state that the threshold of the impeachment of the speaker is 75% of all the members of the County Assembly who are Thirty-Nine (39) in number. This translates to thirty (30) members voting in favour of an impeachment motion and the 1st respondent was very much aware of this provision but he completely ignored the same to actuate an illegal and unlawful impeachment.

16. That the 1st Respondent proceeded to omit the names of the seven (7) members from the list of the votes cast as recorded against the motion in clear violation of standing order No.75 which provides that in case there is an error in the voting list, the vote should be repeated.

17. That the 1st respondent signed in support of the allegations contained in the Notice of Motion, presided over the impeachment process and voted in favour of the motion in clear violation of rules of Natural justice and fair play and Section 20 of the County Governments Act.

18. The unlawful actions of the 1st respondent are meant to completely ensure that the applicant does not deliver on his mandate as the legitimate office bearer of the office of the speaker Nyandarua County Assembly and paint him in the shortest period of time as incapable of continuing to hold the said office without following the strict requirement of the law.

19. That the actions complained of by the petitioner/ applicant pose a gross indictment to the rule of law and if allowed to stand, the said actions and threat of further similar actions will definitely lead to lawlessness, hooliganism, and chaos as the 3rd respondent resumes for sessions on the 16th February, 2021 if the Honourable Court does not intervene and grant the orders sought herein.

20. That the impeachment of the 10th February, 2021 was in clear violation of orders of the court issued on the 26th February, 2021.

21. The 1st Respondent **Stephen Njoroge Mwaure**, the acting County Secretary averred that the supporting affidavit sworn by the petitioner is fatally defective as the jurat stands on its own and that the petitioner, applicant has approached the wrong court as he is seeking to appeal the decision of a political party through the instant application.

22. The 1st respondent averred that he has not been served by an amended petition alluded to in prayer of the notice of motion, and that for any amendment to be effected after close of pleadings, there has to seek leave of the court which has not been granted in this circumstances. The 1st respondent further averred that the impeachment process was transparent and that due process of the law was followed, hence the threshold for the removal of the speaker was adequately met. He added that as a consequence of the 7 members' suspension, they lacked the requisite *locus standi* to engage in any activities of the party.

23. He further averred that the communication of the suspension of the members of the County Assembly was first communicated to the suspended members personally, before being communicated to the rest of the members of the jubilee party through their various communication channels and to the chief whip of the county assembly hence the suspended members were obligated to abide by the terms of the suspension.

24. The 1st respondent averred that in abiding to the terms of the suspension letters, they were ordered to step aside and /or desist from undertaking any activities of the county Assembly until the completion of the suspension period and /or lifting of the suspension. The decision to suspend the aforesaid members was done by the National Executive Committee of the Jubilee Party and it is final. If the alleged members were dissatisfied with the manner their suspension was done, then they should have raised it through the mechanisms provided for by the party as it was not the prerogative of the County Assembly to examine the internal workings of the jubilee party.

25. That the suspended members lacked the capacity to vote and /or participate in the County Assembly businesses, it only behooved on them to step aside and let the impeachment be undertaken as they ceased to have capacity to engage in all the County Assembly businesses as soon as they became aware of the existence of the said letter. Ignoring the presiding speaker's request to exit from the County Assembly, obviously they were trying to precipitate anarchy and or chaos. Although, they defied the presiding speaker and voted, their votes couldn't be counted and the said communication was properly put before the house.

26. The 1st respondent averred that the Applicant herein must as of right understand that an impeachment process is a political process aimed at entrenching good governance hence the Applicant ought to know that being run through an impeachment process is an expected process with the position he holds. The Applicant must remember that he was appointed through a political process by the said MCAs and once they make a decision to eject him, he must understand it and respect their decision. Assuming he was allowed to go back to the said house, he

wouldn't even have the necessary quorum to run the house because he only had eleven (11) MCAs on his side instead of the required quorum of 13 MCAs, out of the Eleven, seven (7) were suspended by the party. In politics, the majoritarian theory has a great place.

27. The 1st respondent averred that One (1) MCA is deceased and therefore the MCAs before the suspension of the Seven (7) were Thirty-Eight (38). After the suspension of the 7 members, the MCAs tally dropped to Thirty-One (31). As such the eligible votes were Thirty-One (31). As per **Sections 11 of the County Government Act**, the entire membership of the house for all intents and purposes was now Thirty-One (31) in view of the fact that those Seven (7) MCAs lost their capacity to be in the House and engage in the businesses of the house. Hence the threshold of 75% was surpassed.

28. The Applicant admitted he was accorded a fair hearing and had over two (2) hours to defend himself before the floor of the house duly represented by legal counsels, therefore he must accept the outcome of the process. The County Assembly is a statutory institution whose decisions must be respected by the courts. The court ought to really restrain itself in moves geared towards intervening in the County Assembly internal processes.

29. The Applicant made it very difficult to have the processes of the impeachment conducted peacefully despite there being an express court order to that effect, he prevailed upon the table clerks to enter results as they wished. Further, that the official declaration of the roll call vote on the motion for removal of Hon. James Wahome Ndegwa annexed by the Applicant as JWN 7 was only signed by a table clerk one Mr. Joel K. Gicheha who signed it even before the Presiding Speaker had signed it as is expected.

30. The 1st respondent averred that even after the presiding Speaker communicated the Resolution of the house to impeach the Speaker, the Applicant has continued to act as Speaker. In fact, he has continued to commandeer the County Assembly staff and all efforts to run the Assembly after his ouster are being thwarted. This is clear from the letters done to the deputy Speaker on the 11th day of February 2021 by the Acting Clerk and a letter dated even by the Speaker dismissing the impeachment. It is not open for the Speaker who was the target to be the paragon of determining whether or not an impeachment was conducted.

31. The 1st respondent averred that the orders sought by the Petitioner/Applicant cannot be granted at this interim stage as such orders can only be granted through interrogation of evidence and proper witness accounts which cannot be undertaken at this interim stage. For the courts the greater consideration is the public interest good which openly tilts against the Applicant, his individual rights herein claimed can't outweigh the public rights of over 370,000 registered voters in Nyandarua County who are duly represented by the majority MCAs who voted to impeach the Applicant. The 1st respondent averred that the petitioner/applicant failed to establish that he has suffered a loss that cannot be compensated by an award of damages.

32. That should this Court make a determination that indeed the Petitioner/Applicant has been unfairly removed from office he can be compensated by an award of damages and will be cleared by the Independent, Electoral and Boundary Commission to vie for any political seat.

33. The 2nd respondent, the acting clerk and authorized officer of the County Assembly, swore an affidavit on behalf the County Assembly of Nyandarua and averred that that the issues raised by the Petitioner are merited and deserve to be heard and addressed by this court. He averred that this Court issued an order on 26th January 2021 in NAKURU HIGH COURT PETITION NO. 2 OF 2021(FORMERLY NYAHURURU PETITION 01 OF 2021 CONSOLIDATED WITH CONSTITUTIONAL PETITION NO. E01 OF 2021) that the impeachment process of the Petitioner/Applicant be carried out in accordance with the law and the standing orders. The Honourable Court further ordered that for the avoidance of doubt the threshold for the removal of the Petitioner/Applicant as the speaker of the County Assembly of Nyandarua as per the provisions of the County Government Act is 75% of all the members of the County Assembly.

34. The 2nd respondent further averred that the office of the Clerk orally advised the 1st respondent being presiding chair that the said communication for the suspension of the 7 members of the County Assembly required time for scrutiny and verification based on the objections raised on its authenticity by some members of the 3rd respondent on the floor of the house and bearing in mind the seriousness of the issue at hand and further advised that the said suspension of a member from the precincts of the County Assembly can only be done through the provisions of the Standing Orders. However, the advice given was not adhered to as the 1st respondent proceeded to order for the withdrawal of the 7 members of the 3rd respondent from the house in clear violation of the standing orders and the law.

35. The 2nd respondent averred that the clerk took the vote of the members of the 3rd respondent, tallied them and submitted the same to the presiding chair/speaker for a declaration. The 1st respondent disregarded the tally of votes provided by the tellers and in breach of the standing orders of the 3rd respondent failed and or refused to announce the result of the votes as presented to him by the two tellers against the advice of the office of the clerk and the provisions of the law that the threshold of the impeachment of the Speaker of Nyandarua County Assembly is 75% of all the members of the County Assembly who are Thirty Nine (39) in number and this translates to thirty (30) members voting in favour of an impeachment motion. The 1st respondent was very much aware of this provision which he ignored and proceeded to declare the wrong tally. He was also in clear violation of the court orders issued on 26th February, 2021.

36. The 2nd respondent in his averments, stated that there has been controversy and uncertainty in the actual position of the holder of the office of the Speaker and the attendant powers, mandates and duties of the petitioner/applicant as against the 1st respondent. Further, that 1st respondent clearly offended express provisions of the law and therefore an indictment to the rule of law and if allowed to stand the said actions will only lead to anarchy, posing a threat to human life and safety as well as destruction of property.

37. The Petitioner/applicant filed a **supplementary affidavit**, and averred that the replying affidavit is defective and should be struck off the record as it is sworn by a different person **Stephen Njoroge Mwaura** who is a stranger to this suit as the 1st respondent was **Zachary Mwangi Njeru**. The applicant averred that his supporting affidavit sworn on 11th February 2021 is not in any way defective and the issue of the Jurat is but a mere technicality which should not hinder the cause of justice pursuant to **Article 159 of the Constitution of Kenya** and

that this court under **Article 165 of the Constitution** has jurisdiction to here and determine this matter.

38. The petitioner/applicant averred that the 1st respondent communication of the contents of the impugned letter purportedly authored by the secretary General of Jubilee party suspending the 7 members and which was done in the middle of the impeachment motion, was unprocedural and meant to defeat the cause of justice.

39. The Petitioner averred that the suspension of a representative of the people from a parliament for such an inordinate period of time amounts to supplanting the sovereignty of the people under Article 1 of the Constitution. The 3rd respondent's standing orders provide for the circumstances under which a member may be ordered to withdraw from the precincts of the County Assembly which is only on instances of gross disorderly conduct under **Standing Order 107** and grave disorderly conduct under **Standing Order 112** and that the suspension of a member can only be done in accordance with **section 17 of the Powers and Privileges Act, 2017**.

40. The applicant averred that the purported suspension of a member by a political party does not warrant a sanction of withdrawal of a member from the County Assembly chamber and precincts nor a suspension from the house as it is not cited as an action constituting neither gross disorderly conduct nor grave disorderly conduct that warrants the withdrawal of a member from the Chambers of the 3rd Respondent or a suspension of a member from the House as had been erroneously ordered by the 1st respondent against the 7 members.

41. The applicant averred that the decision of the party was subjected to a reference before the Political Parties Tribunal on the 11th February 2021, and an order was issued staying the decision of the jubilee party to suspend the members and re-affirming their rights and privileges as members of the County Assembly hence their votes should have been counted. Even in the event of the said members defying the said order to vacate the chambers, the standing orders and the county assembly Privileges Act provides for the manner of sanctions to be met on the members if they act in defiance of the speaker's directive and not in any way renounce their contribution or vote in the 3rd respondent proceedings.

42. The applicant averred that the actions of any of the parties involved in the impeachment process cannot purport to oust the supremacy of the Constitution and the national values and principles including democratic governance, the rule of law, human dignity, human rights, good governance, integrity, transparency and accountability from the process. It is not the prerogative of the Jubilee Party to interrogate the working of the County being a constitutional organ of the devolved structure of governance at the County government.

43. The applicant stated that the issue of majoritarian rule is a far-fetched idea, for the dictates of the laws on a required threshold of 75% of all members for the removal of a Speaker of a County Assembly is not wishful thinking and as such cannot be just wished away for we are in a constitutional democracy governed under the rule of law. The threat to deny the sittings of the 3rd respondent quorum by boycott of the sittings of the County Assembly by the Members of the 3rd respondent who voted in support of the applicant's impeachment is not only an indictment to the sovereignty of the people under Article 1 of the Constitution but also a matter of integrity under chapter six of the Constitution for this is an abdication of a Constitutional duty for which appropriate sanctioning are provided in the constitution and the law.

44. The applicant averred that it is in public interest that the prayers sought herein be granted as the actions he complains of clearly offends the constitution and if allowed to stand they said actions will lead to anarchy, especially during the sittings of the 3rd respondent.

PETITIONER'S SUBMISSIONS

45. The petitioner submitted that in order for him to have been declared lawfully impeached, the Notice of Motion dated 15/12/2020 must have been voted for by not less than 75% of all members of the County Assembly. The Act does not state only members present and voting and or/ eligible members only, rather it states all members of the County Assembly.

46. The gazetted number of members of the County Assembly is 39 in total, none of the members have been degazetted to date, hence 75% would be 29.25, the proper threshold would be not less than 29.25 hence 30 members supporting the resolution to impeach would form a proper threshold. The Petitioner submitted that it was not in dispute that only 26 members supported the motion, 11 were against and 2 were absent. It follows therefore that the said Notice of Motion was not supported by 75% of all members of the County Assembly. The pronouncement by the 1st Respondent that the motion was successful after excluding 7 votes of the members who had voted against the motion is erroneous and illegal and in violation of the orders of Hon. Justice Prof. J Ngugi dated 26th January 2021. The said Court having taken a supervisory role over the impeachment process and having given a mention date after the expected date of conclusion of the impeachment process was to be the only one to make a pronouncement on whether the applicant had been lawfully removed from office and not the 1st respondent.

47. The petitioner submitted that suspension of a member by a political party even if lawful does not make such a member to cease from being a member of the County Assembly. Such is not one of the grounds in which a member loses their primary obligations, rights and privileges as envisaged under Article 194 of the Constitution. In the instance case, as per the letter dated 9th February 2021, the 7 MCAs were purportedly suspended from house sittings by the party but not removed from office pursuant to the provisions of Article 194 of the constitution. An MCA can only be removed from office pursuant to a legislation enacted under Article 80 of the Constitution. The only way a member can lose their sit through the political party is where a member resigns from the party.

48. The petitioner submitted that there is nothing to show that those members had been deemed to have resigned pursuant to the law as to cause them to lose their MCA positions. The actions of the Jubilee Party to purport to suspend the 7 MCAs did not render their positions vacant since in any event there is no law empowering a political party to suspend a duly elected member from carrying out the functions of the County assembly unless duly recalled pursuant to Section 27 of the County Governments Act. A Party can only suspend such a person from being a member of the political party and/or other benefits conferred by such membership but not from sittings of the County assembly as that would be usurping the powers donated to the electorate by legislation.

49. As for nominated MCAs a member can only cease from being an MCA upon being duly expelled from the party through recognized disciplinary procedures and the decision made by the National Executive Committee and not the purported jubilee Party Internal Resolution Committee which is unknown in law and the Constitution of the Jubilee party. Therefore, the interpretation by the 1st Respondent following the purported suspension of the 7 members from the Jubilee Party that the membership of Nyandarua County Assembly on the 10th of February, 2021 when the Motion dated 15th December, 2020 was being considered was 31 in number was not only erroneous but null and void for all intents and purposes.

50. Additionally, the mere fact that the said purported suspension was only in relation to the members who were in support of the Applicant herein is clear that the sham suspension was only aimed at stealing a match as against the Applicant with the sole intention of ensuring that the results of the impeachment motion were in favour of the Respondents by whatever means and was in clear contravention of the Applicant's right to a fair administrative action, legitimate expectation that he would be subjected to a fair process, blatantly in violation of rules of natural justice, was not administratively reasonable and thus flew on the face of Article 47 of the Constitution.

51. In fact, even assuming that the 1st Respondent was legally correct in excluding 7 votes of the members purportedly suspended by the Jubilee Party, that did not mean that the membership of the Assembly was lowered from 39 to 31 as those members were still members of the house and as such it simply meant that the motion of impeachment was still lost as the threshold of the 75% of all members of the County Assembly was not met. Further, the fact that the said letter dated 9th February, 2021 communicating the suspension of the members did not pass through the office of the clerk before the business of the house started means that it was not properly before the house. The same ought to have been served upon the office of the Clerk upon which it then becomes an agenda for discussion when other matters are being discussed in that session.

52. In view of the foregoing, the applicant submitted that the application raises weighty issues that touches on his fundamental rights and freedoms hence the court should find that a *prima facie* case has been established as to warrant this court to issue injunction orders as sought in the application so as not to render the proceedings herein nugatory. The Applicant placed reliance on the supreme court case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKlr.**

53. On irreparable loss and damage the applicant submitted that failure by this court to grant him orders of injunction sought would occasion him grave prejudice, loss and damage that can never be repaired as the 3rd respondent may proceed to degazette him, declare a vacancy in the said office and proceed to appoint another speaker in lieu thereof. The applicant stated that he also serves as the current elected Chairman of the County Assemblies Forum a position he would automatically lose. Subsequently, even if the Court were to eventually find that he was illegally removed from office, it would be too late for him to take his two positions back as another speaker will have been elected already. Further, the prejudice suffered by losing a state office unlawfully and/or being subjected to an unfair process cannot be quantified as salaries and other remunerations cannot provide adequate compensation.

54. In his final submissions, the applicant stated that the process leading to the impugned impeachment proceedings is a court supervised process, it is this court that set the guidelines for the lawful impeachment and even gave a date to confirm progress. It therefore follows that it is this court that will finally declare whether or not the petitioner was lawfully impeached and therefore the principle of legality of decisions of Constitutional bodies takes a backseat in the circumstance of this matter.

1ST AND 2ND RESPONDENTS' WRITTEN SUBMISSIONS

55. The 1st and 2nd respondent submitted that the applicant is not entitled to the raft of the interlocutory orders of injunctions sought as he has not established a *prima facie* case as espoused in the case of **Susan Wangari Mburu and 5 others v Eldoret Water and Sanitation Company Ltd and another (2020) Eklr.** The parties herein are at variance on the correct interpretation of Section 11 (c) of the County Governments Act 2020. Both interpretations are persuasive and on this ground, the applicant cannot be said to have made a *prima facie* case. The respondents referred to the case of **Okiya Omtatah Okoiti & Another v Nairobi City County Assembly & 5 others.**

56. The 1st and 2nd respondent submitted that the applicant will not suffer an irreparable damage for the sole reason that the office of the speaker is a public office which was created for the interests of the general public and not for the benefit of any individual. They placed reliance on the case of **Ameja Zelmoni v County Assembly of Baringo, Speaker of the County Assembly of Baringo & Another (2020) eKlr** where the court being guided by the Andrew Kiplimo case stated that there is no property in a public office. The applicant will not suffer irreparable damage since his term as the speaker of Nyandarua County as well as that of the Chairman of the County Assemblies Forum has been terminated through impeachment a lawful process provided for by law.

57. The 1st and 2nd respondent submitted that the balance of convenience in this matter tilts in favour of the respondents. The majority members of Nyandarua County 26 in number voted for the removal of the applicant from office, hence granting of the orders of injunction would be disregarding the will of the majority of the members of the County Assembly of Nyandarua who represent the views of the people of Nyandarua County and giving effect to the private rights of the applicant. The 1st and 2nd respondent submitted that the application is unmerited and its fit is for dismissal.

ISSUES FOR DETERMINATION

58. I have considered the application, the supporting affidavit, the rival submissions from both parties and the following broad issues fall for determination.

(a) Whether the 7 members of the County Assembly were lawfully suspended from the house and if they were eligible to vote. Whether the impeachment process was lawful?

(b). whether a *prima facie* case has been established by the applicant.

Whether the 7 members of the County Assembly were lawfully suspended from the house and if they were eligible to vote.

59. This is actually the crux of the matter. If indeed the suspension is found to be lawful then it may follow that the impeachment process may have met the threshold of 75% set in the act and reinforced by the court through its ruling of 26th January 2021.
60. The letter from Jubilee Secretary General Hon. Tuju was delivered to the assembly through a WhatsApp means as admitted by the respondent and was presented during the proceedings of impeachment. Efforts by the acting clerk Gideon Mukiri Muchiri as per his replying affidavit sworn on 19th February 2021 to have the chief whip follow the procedure in presenting the said letter to the speaker in the proper manner were not adhered to.
61. One would then ask whether presenting the letter electronically in a personal phone with an assumption that the same was in “public domain “would be considered appropriate. Of course there was an argument by the 3rd respondent that the 7 MCA had already been notified individually and separately. Apparently none of the 7 MCAs came forward to swear affidavit to that effect.
62. Whereas this could be so, the issue is whether the 3rd respondents standing orders provided such means of communication. From annexure GMM3 of Mr. Muchiri replying affidavit standing order 159 of the 3rd respondent rules provide that the same ought to be in writing. In other words, all communication from the whip must be in writing.
63. Further the standing orders of the 3rd respondent again attached as annexure GMM 4 provides for situations where one may have conducted himself disorderly and how he will be suspended. This is provided under section 107 to 112.
64. There is no evidence that the letter from the jubilee party was presented officially before the assembly. The same was in an electronic form and was not presented to the assembly for interrogation despite objections from some of the assembly members. It must be noted that as at the time of the debate on the impeachment motion the 7 suspended members of the county assembly were still validly serving as members of the assembly. The alleged letter in any case was not presented to this court by the 3rd respondent save what was attached to the applicant’s application.
65. It is therefore apparent that the order of them to withdraw from the precincts of the assembly was illegitimate to the extent that their conduct was not subjected to any discussion as it was never in the business order of the day as is normally required. Given the obviously charged political atmosphere surrounding their suspension from the party there was no reason why they should not have been accorded a proper reasonable time so that the assembly could discuss their conduct. The rules of natural justice ought to have been exercised least of all by the acting speaker in conjunction with the chief whip who was essentially a liaison between the jubilee party and the speaker at that moment.
66. This brings me to the next issue of the 75% threshold for removing a sitting speaker. Section 11(1) of the County Government Act no 7 of 2012 provides as follows.

(1) The office of speaker shall become vacant—

- a) when a new county assembly first meets after an election;**
- b) if the office holder is disqualified from being elected as a member of a county assembly on grounds specified under Article 193(2) of the Constitution;**
- c) if the county assembly so resolves by a resolution supported by at least two-thirds of all the members of the county assembly;**
- d) if the office holder resigns from office in a letter addressed to the county assembly; or**
- e) if the office holder dies.**

(2) The speaker may be removed pursuant to subsection (1) (c) on any of the following

- a) gross violation of the Constitution or any other law;**
- b) incompetence;**
- c) gross misconduct;**
- d) if convicted of an off punishable by imprisonment for at least six months; or**
- e) inability to perform the functions of the office of speaker arising from mental or**

physical incapacity.

67. The above resolution is made by “**all the members of the county assembly**”. This position was reinforced by my brother Hon. Justice Prof. Ngugi in his ruling of 26th January 2021 where he clearly stated that the threshold of 75 % must be met. The members of the 3rd respondent are 39 and as at the time of the motion none of them had been de-gazetted except one who was deceased. From the strict reading of the above section 11(1) the threshold was supposed to be 29.3 which is ideally 30 members.

68. The number of those who voted for the motion were 26 against 11 who voted against making a total of 37. Two of them were absent. Was the declaration by the 1st respondent that the 75% threshold was met proper in the circumstances? To answer this question one must look at whether at the time of voting the 7 members who had been suspended by jubilee party had the right to vote.

69. Article 194 of the constitution provides for the circumstances when an office of an MCA is considered vacant.

70. The letter dated 9th February 2021 suspended them from the party but did not expel them as it appears that they were yet to face other disciplinary process by the party. None of the constitutional grounds stated above had been met by the time the debate was on. It is true that the whole suspension had to do with inter party discipline and this court as rightfully submitted by the respondents should not venture into it for now. The court however to the extent that the Jubilee party wanted to rely on its correspondence in dealing with the 3rd respondents proceedings ought also to comply with the constitution and the relevant laws thereunder and above all the cardinal rules of natural justice.

71. In a nutshell, the letters from the party to the MCA may have been appropriate but ought to have been properly presented to the assembly within its standing orders. In fact, the letters clearly stated among others that “**do therefore proceed to communicate this decision to the assembly as required by the Nyandarua county assembly standing orders in the usual manner**”.

72. There was therefore no two ways about it but to follow the assembly’s standing orders which in my view superseded those of the party especially on the question of protocols and procedure to be followed. The jubilee party letter did not pass through the hands of the clerk as is the practice and therefore the action of the chief whip alerting the acting speaker in the heat of the moment and proceedings smacks lack of good faith. The party in terms of its disciplinary mechanism cannot be fettered by this court and if indeed the matter is pending before it in whichever fashion, this court cannot for now enter into such an arena.

73. Suffice to state that to the extent that the 7 MCA are still elected members of their respective counties and as long as they subject themselves to the assemblies’ procedures and rules they have every right to participate in its debates and proceedings. For that reason, their votes counted during the impeachment exercise.

74. The decision by the acting speaker not to announce what the tellers had presented was procedurally wrong. His business was to announce what he had been given by the two tellers as per standing orders of the assembly and if there was any doubt or procedural impropriety he should have gone ahead to call for a role call or at most another vote.

75. One can easily conclude that the 3rd respondent was determined to ensure that the 7 votes were not taken into consideration in the final tally. For the foregoing reasons it is apparent that the threshold of 75% was not met. The **yes** votes were 26 which represented 70.2 % while the **no** votes were 11% representing about 29.7 %. The 75% is absolute and one irresistibly conclude that its caste on a stone.

76. Having said so, it is therefore clear that the motion of 15th December 2020 brought to impeach the applicant did not meet the threshold of 75% for the reasons stated above. Can one therefore conclude that the applicant has established a prima facie case? I think so. On the basis of material placed before this court i find that the letters suspending the 7 MCAs was not placed before the assembly procedurally and whatever was done by the chief whip and the acting speaker was in violation of the standing orders.

77. Secondly, the announcement of the results of the vote by the same speaker did not comply with the standing orders for he announced what he wanted to suit him and not what the tellers had presented to him. It was not his business to cut out the 7 members and retained the 5 whom he found suitable or in any way edit the results.

Prima facie case?

78. Has the applicant established a prima facie case and thus capable of being granted the orders in the interim? I think the answer is on the affirmative. Having found that the impeachment procedure and process was flouted, there is need therefore to protect the *status quo* pending the determination of the main petition. The speaker’s office is obviously critical in the assembly and any attempt to impugn it must meet the highest threshold.

79.. The court in the case of **REPUBLIC V. CLERK COUNTY ASSEMBLY OF BARINGO EXPARTE WILLIAM KAMKET (2015) eKLR**, which involved the removal of the speaker emphasized the above threshold when it stated that;

“Quite clearly, removal of a speaker must follow a fair administrative action. The rules of natural justice must apply. The office is ring-fenced by requiring disclosure of grounds or reasons for removal, service of notice and a very high threshold to carry the motion. The elements of a fair hearing were well stated in Halsbury’s Laws of England, 5th Edition, 2010, Vol. 61 at para. 639 –

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been

imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

80. Contrary to the submissions by the respondents, the retention for now of the applicant as the speaker will not cause any prejudice to the assembly which at any rate employed the same speaker. Even for argument sake, the assembly retains the prerogative of hiring and firing the speaker as legally mandated as long as they follow due process and the law. In a nutshell he enjoys the position, the trappings thereof at the whims of the assembly.

81. This court has said much to show that the application is meritorious. The balance of convenience tilts in favour of the applicant. The application is hereby allowed as hereunder.

(a) There be a temporary injunction and or stay of execution of the 3rd respondent's decision dated 10th February 2021 which impeached the applicant pending the hearing and determination of the petition herein.

(b) This courts orders dated 23rd February 2021 are hereby superseded by this ruling for all intent and purposes.

(c) The costs of this application shall await the outcome of the main petition.

Dated signed and delivered electronically at Nakuru this 29th day of April 2021.

H.K .CHEMITEI

JUDGE